SIXTH CIRCUIT REVIEW

To Be Decided: Because of Sex or Not?

MEAGAN E. DIMOND

The Sixth Circuit's holding in *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018), that "discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex" under Title VII of the Civil Rights Act of 1964 is under review as part of a triad of cases recently argued before the Supreme Court. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018); *Bostock v. Clayton Cty. Bd. of Comm'r.*, 723 F. App'x 964 No. 17-13801 (11th Cir. 2018) (mem.). On Tuesday, October 8, 2019, the nine Justices heard oral arguments in cases about whether a federal law that prohibits discrimination "because of . . . sex" covers discrimination based on sexual orientation and sexual identity.

In *R.G. & G.R. Harris Funeral Homes*, a longtime employee of the funeral home, Aimee Stephens, was fired after informing her boss that she intended to live and work as a woman and would eventually have sex-reassignment surgery. The owner of the funeral home, Thomas Rost, explicitly justified the firing because he would be "violating God's commands if [he] were to permit one of [the funeral home's] funeral directors to deny their sex while acting as a representative of [the] organization." *Id.* at 569. The consolidated cases from the 2nd and 11th Circuits, *Zarda* and *Bostock*, involve two men, one a skydiving instructor and the other child-welfare-services coordinator in Clayton County, Georgia, who argue that they were fired for being gay.

All three cases revolve around two key arguments: one purely textual and one based on precedent. The central textual argument is that discrimination because of someone's gender identity or sexual orientation is, by definition, "because of . . . sex." They are also arguing that, even if the textual argument fails, the discrimination is clearly within the precedent set in Price Waterhouse v. Hopkins, which held that discrimination based on failure to conform to stereotypical gender norms is covered under Title VII. 490 U.S. 228, 256 (1989).

Oral arguments (audio recordings can be found here and here) centered on the textualist argument. Justice Gorsuch, a potential swing vote and staunch conservative, stated that the textual evidence was close, signaling that the argument may be successful, but experts are undecided

on how this case will come out. Will they decide the same in both cases? Is the argument stronger for one case? Are the purported potential social impacts and the Justices' views of judicial activism too insurmountable of hurdles? Or did Justice Sotomayor's wise words during oral argument resonate:

> [A]t what point does a court continue to permit invidious discrimination against groups that, where we have a difference of opinion, we believe the language of the statute is clear . . . . At what point does a court say, Congress spoke about this, the original Congress who wrote this statute told us what they meant. They used clear words. And regardless of what others may have thought over time it's very clear that what's happening fits those words.

A decision is unlikely to come until the end of this term in late spring or early summer, but no matter what the justices decide, the potential impact of their decisions is clear.

There are three primary ways LGBTQ persons can currently be protected from employment discrimination: explicit state law, an interpretation of state law that includes gender identity and sexual orientation in discrimination because of sex, or a judicial interpretation of the federal Title VII statue (at issue here). According to the Movement Advancement Project, 56 percent of LGBTQ people are currently living in a state with a federal circuit court decision holding that sex discrimination includes discrimination based on gender identity. Four other circuits in addition to the Sixth Circuit (the First, Seventh, Ninth, and Eleventh) have made similar decisions to the one currently before the Court. These circuits encompass 23 states—only nine of which have separate state law protections prohibiting employment discrimination on the basis of gender identity.

Should the Supreme Court of the United States decide to reverse the decision of the Sixth Circuit in Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc., the LGBTQ community will lose a primary means of protection from employment discrimination—a means of protection relied upon by people in 14 states. States with no explicit statutory or common law protections can no longer rely upon a judicial interpretation of federal law, leaving LGBTQ people in these states with little to no protection or recourse.

The situation is even more dire when it comes to protection from discrimination on the basis of sexual orientation. While the district courts

have generally held in favor of the transgender community's rights, the same cannot be said for sexual orientation. Eleven of twelve circuits have had to decide this issue, but only two have interpreted "because of . . . sex" to include sexual orientation—nine circuits have held otherwise. An overwhelming 84 percent of LGBTQ people are currently living in a state where a federal circuit court has explicitly held that sex discrimination does not include discrimination based on sexual orientation. This means that 44 states and the District of Columbia, including those in the Sixth Circuit, do not extend the umbrella protection of the federal law, and only 17 of those states provide any protection at the state level. A vast majority of the LGB community is relying upon a favorable Supreme Court decision to ensure any sort of protection at all. A decision to the contrary has potentially devastating consequences.

It has been argued that this is not what Congress intended. It has been argued that these cases are different enough that precedent should not apply. The textual evidence in support of Aimee Stephens, Donald Zarda, and Gerald Bostock can be ignored. The court may push textual and precedential arguments aside and argue that the social impact is too profound or that extending employment discrimination protections to the LGBTQ community is the role of a democratically elected body, not the judiciary. But, as Justice Sotomayor posits, perhaps this is a time, like numerous times in the past, that invidious discrimination should be brought to a halt. Here the case is clear because the text provides an answer. Precedent provides an answer. Our social morality provides an answer. Let us just hope the Justices agree.